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Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER STANLEY WILKINSON

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I. INTRODUCTION.

The responses of the Tribe and its *amici* to petitioner Wilkinson's arguments revolve around four primary themes.

First, they assert that Congress has not divested the Tribe of its original, pre-Treaty power to manage comprehensively all of the land within the Tribe's reservation. Because *Montana v. United States*, 450 U.S. 544 (1981), which reflects but one instance of this Court's repeated recognition that Congress has modified Chief Justice Marshall's absolute view of tribal sovereignty, stands as an obstacle to that position, they attack *Montana* as "unprecedented" and as a "momentary" "divergence from recognized law", the authority for which the Tribe is "unwilling to accept." *See Brief of Respondent, Yakima Indian Nation* ("*RB*") at 36, 40 & 42.

Second, they urge that under *Montana* the Tribe necessarily possesses the power to regulate all land within the reservation because a checkerboard scheme of civil land use regulatory jurisdiction *by definition* interferes unacceptably with the Tribe's political integrity, economic security and health and welfare. *See, e.g., RB* at 31, 43 n.23.

Third, they assert that the pre-Constitutional status of Tribal power stands as an absolute barrier to the constitutional concerns of nonmembers of the Tribe *in this case*. *See, e.g., RB* at 47-49.

Fourth, they give short shrift to the District Court's findings of fact and assert that if the County of Yakima has any land use authority over reservation fee lands, *Whiteside II* should be remanded to the District Court for the balancing the Ninth Circuit envisoned between Tribal and County interests in exercising such power in the open area. *RB* at 31-35.

None of these contentions withstands scrutiny.

II. CONGRESS HAS DIVESTED THE YAKIMA INDIAN NATION OF THE PRE-TREATY TERRITORIAL AUTHORITY IT CLAIMS OVER NONMEMBERS OF THE TRIBE AND THEIR PROPERTY.

A. The Tribe Does Not Retain Absolute Civil Power Over Nonmembers Within Reservation Borders.

This Court has recognized both that tribal authority includes a " 'significant geographical component' " defined by reservation boundaries, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983), *quoting, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), *and* that in the jurisdictional context "the reservation boundary is not absolute." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 151. The Tribe's assertion in this case that it retains a comprehensive power coextensive with reservation borders over all land use thus represents an unacceptable return to the absolutism this Court eschewed when it "long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view in Worcester'. . . and . . . acknowledged certain limitations on tribal sovereignty." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331, *quoting, Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

B. *Montana v. United States* Correctly Establishes That Congress Generally Divested The Tribe Of Civil Land Use Regulatory Jurisdiction Over Nonmembers On Fee Lands Within Reservation Borders.

Wilkinson does not take issue with the principle that the Tribe retains "those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of [its] dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). *Compare Wilkinson Brief* ("*WB*") at 27 *with RB* at 24 & 36-37. Application of that principle, however, requires recognition that the Tribe no longer possesses the full civil regulatory power it asserts over nonmembers.

This Court's explanation in *Montana* of the impact of the Allotment Acts on treaty provisions setting land apart for a tribe's "exclusive use and benefit," establishes unmistakably that reservation borders no longer define a comprehensive tribal civil regulatory power over nonmembers and their fee land: *"It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction . . ."* *Montana*, 450 U.S. at 559 n.9.[1]

Similarly contrary to the Tribe's assertion (*RB* at 39), this Court has determined that the implicit divestiture principle of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (which provides both that "Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns" and that the governance of nonmembers is one of those "inconsistent" powers, *Montana*, 450 U.S. at 565), applies in the civil context: "Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign

[1] Congress's allotment policy, embodied in both the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, and in the special Yakima Reservation allotment enactments, is central to this case. *See WB* at 5-9. *Amici* Colville Tribe, *et al.*, have made the unfounded assertion, contrary to the undisputed evidence the *Yakima Nation* submitted below (Tr. 556, 557; Ex. 248), that the Yakima reservation was alloted solely pursuant to "special treaty provisions." *Colville Brief* at 10 n.10. The unrefuted evidence of record belies this assertion. An historian of the Yakima Nation, a member of the Tribe whose work *the Tribe* relied upon below to establish the impact on the reservation of the Allotment Acts, refutes that position (Ex. 248 at 59-60), and it should not be given credence here.

In a related matter, *Amici* Colville Tribe makes a similarly unexamined argumentative assertion that "petitioners maintain that land ownership patterns on reservations have remained static since the effects of the Allotment Act were noticed." *Colville Brief* at 11 n.11. This could not be more inaccurate; petitioner Wilkinson's arguments, and his statement of the case, highlight the evolution of the reservation, including the Tribe's post-Allotment Act reacquisition of fee land. *See, e.g.*, WB at 16, 36-38 & n.11.

powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* (footnote omitted). This reasoning is entirely consistent with this Court's recognition that "unwarranted intrusions on . . . personal liberty," *Oliphant*, 435 U.S. at 210, are no less constitutionally offensive because they occur in the civil context. *Cf. Fuentes v. Shevin*, 407 U.S. 67 (1972).

Thus, as the Tribe recognizes, any Tribal claim to full territorial power over nonmembers on fee land must hurdle *Montana*. *Cf. RB* at 36, 38-43, & 44.

This Court's reliance in *Montana* on the continued impact of Congress's allotment policy on tribal civil regulatory power over nonmembers on fee land is undoubtedly correct.

1. *Montana Is Consistent With Prior Authority.* Neither *Morris v. Hitchcock*, 194 U.S. 384 (1904), nor *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), which the Tribe's *amici* rely upon extensively, puts into question this Court's reasoning in *Montana*.

Morris v. Hitchcock did not concern tribal power over nonmembers on fee lands, but rather addressed tribal taxing authority over the cattle of nonmembers that were grazing on trust land pursuant to a business arrangement between tribal members and nonmembers. 194 U.S. at 384-385. Even staunch advocates of tribal authority recognize that any statement in *Morris* relating to tribal power over nonmembers on fee land can only be characterized as dictum. *See Cohen's Handbook Of Federal Indian Law* (1982 ed.) at 256 n.114.

This Court appreciated these distinctions. It cited *Morris* in *Montana*, but *solely* as authority for the proposition—uncontested here—that a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members . . ." *Montana*, 450 U.S. at 565-566.

Buster v. Wright is similarly unpersuasive. In fact, in *Buster*'s own language, that case affirms the "general rule of law announced in *Bates v. Clark*, 95 U.S. 204, 205, 208, 24 L.Ed. 471, that all the original Indian country remains such *until the Indian title to it is extinguished, and no longer*, 'unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case' ". 135 Fed. at 952 (emphasis added.) *Buster* fell within this exception. *Id.* The fee land in *Buster* was not land the tribe had reserved from a cession of territory and which was thereafter allotted, but rather was land that was patented *to* the Creek Nation *from* the United States. *Id.* at 951. Thus, a "different rule was made applicable" to this special case of the *relocated* Creek Nation (one of the Five Civilized Tribes), which pursuant to Congress's express intent was extended a power over the fee land of nonmembers that would otherwise have perished with Indian title. *Id.* at 952. Further, *Buster* dealt with the extent of tribal power in regard to a consensual business arrangement—"the privilege which [the Creek Nation] offers to those who are not citizens of its nation of trading within its borders". *Id.* at 949. Thus, it also falls within *Montana*'s "consensual relationship" exception to the general prohibition of tribal regulatory authority over nonmembers on fee lands. *Montana*, 450 U.S. at 565. *See also United States v. Mazurie*, 419 U.S. 544, 557-558 (1975).

2. *Montana Is Consistent With Congress's Post-Allotment Era Enactments.* The Tribe and its *amici* make much of the datum that Congress has repudiated the allotment policy of the nineteenth century, a point this Court specifically acknowledged in *Montana*. 450 U.S. at 559 n.9. This repudiation, which manifests itself in Congress's decision to cease allotting reservation land and to foster tribal self-government, is said to eliminate the *effects* of the allotment process. This is simply untenable. One cannot ignore history. *Cf. Rosebud Sioux*

Tribe v. Kneip, 430 U.S. 584, 615 (1977). Only if Congress has legislated specifically to remove the effect of its prior policy can the Tribe's position stand. Congress, however, has not so legislated.

a. *25 U.S.C. § 476.* As the *amici* States of Arizona, *et al.* show conclusively, the 1934 Indian Reorganization Act's statement that tribes retained "all powers vested . . . by existing law", 25 U.S.C. § 476, did not imply a recognition that tribes possessed comprehensive civil regulatory power over nonmembers on fee lands. Rather, this statement represented a legislative acquiescence, after extensive debate and controversy centering upon this very question, to the proposition that tribes would continue to possess only limited authority regarding nonmembers on fee lands. *See Brief of Arizona, et al.* at 10-16. Almost immediately after passage of the Act, the Executive Branch confirmed this view. *Id.* at 16-20, *discussing*, Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I 484 at 489-491 (M. 27810) (advising that a tribe possessed the inherent power of eminent domain *only* with respect to tribal members). *See also* 55 I.D. 14, 50 (1934) (Interior Department opinion recognizing that nonmembers occupying fee land within a reservation are insulated from tribal authority in regard to rights vested in them by federal law). This Court recognized as much in *Solem v. Bartlett*, 465 U.S. 463, 468 (1984):

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the *Indians* held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had *not* yet been claimed by non-Indians. . . . *Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.* See Act of June 25, 1948, ch.

645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.)).

(Emphasis added.)

b. *18 U.S.C. § 1151.* Congress's enactment in 1948 of the currently effective definition of "Indian Country", 18 U.S.C. § 1151, which this Court referred to in the above quoted portion of *Solem v. Bartlett*, did not erase the impact of the allotment process on the rights of *nonmembers*. *Moe v. Confederated Salish and Kootenai Tribes Of The Flathead Reservation*, 425 U.S. 463 (1976), which preceded *Montana*, establishes only that 18 U.S.C. § 1151 embodies a Congressional intent to displace checkerboard Tribe-State civil jurisdiction over tribal *members* within a reservation. *Id.*, 425 U.S. at 478-479. Section 1151 does not mandate the elimination of checkerboard civil regulatory jurisdiction over nonmembers on fee land. Indeed, *Moe* upholds a *State's* exaction of a tax *within a reservation* from *nonmembers* of a tribe. *Id.*, 425 U.S. at 481-483. *WB* at 40 n.12. *See also Rice v. Rehner*, 463 U.S. 713, 721 (1983) (tribal sovereignty is implicated by state regulation of alcohol "only insofar as the State attempts to regulate . . . sale of liquor to other members of the Pala Tribe on the Pala Reservation") & *id.* at 720 n.7 ("[r]egulation of sales to non-Indians or nonmembers of the Pala Tribe simply does not 'contravene the principle of tribal self-government' "); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (holding that a state tax on nonmembers within a reservation does not transgress the doctrine of tribal self-government "for the simple reason that nonmembers are not constituents of the governing Tribe"); *Washington v. Confederated Bands And Tribes Of The Yakima Indian Nation*, 439 U.S. 463, 501 (1979) ("classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States").

This reading of section 1151 comports with this Court's repeated recognition that the relations among the federal government, the Indian tribes and the States ultimately turn on "the unique status of Indians as 'a separate people' with their own political institutions". *United States v. Antelope*, 430 U.S. 641, 646 (1977). *See also, e.g., United States v. Kagama*, 118 U.S. 375, 381-382 (1886) (Indian tribes constitute a "separate people, with the power of regulating their internal and social relations").

Congress has recognized that the integrity of a tribe depends on its ability to govern itself under its own laws, *Williams v. Lee*, 358 U.S. 217, 220 (1959); to determine its membership and enforce its domestic customs, *e.g., Fisher v. District Court*, 424 U.S. 382 (1976); The Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.;* to preserve its unique religious and cultural heritage, *e.g.,* The American Indian Religious Freedom Act, 42 U.S.C. § 1996; and to prevent nonmember activities that threaten such core values, *Montana*, 450 U.S. at 564-566. The broad reading of section 1151 the Tribe and its *amici* urge is unnecessary to achieve any of these ends. It also reflects an unwarranted contention that recognition of County authority over nonmembers occupying fee land is tantamount to disestablishment of the reservation. *See, e.g., Brief Of The Colorado River Indian Tribes* at 12. This falsely paints petitioner Wilkinson as an extremist. Wilkinson's point is more modest and far less inflammatory: the Tribe undoubtedly retains certain powers "over non-Indians on [its] reservation[ ], even on non-Indian fee lands." *Montana*, 452 U.S. at 565. The power the Tribe here asserts, however, is not one of them. *Id.*

c. *Recent Statutes.* Congress's more recent enactments, *see, e.g., RB* at 44, foster tribal *self*-government and independence, but do not undermine *Montana*'s recognition of the continued impact of Congress's former allotment policy. None of the statutes the Tribe cites displace State and local land use regulatory jurisdiction over

nonmembers on fee land. The federal environmental statutes the Tribe cites are particularly apt.

There is a clear distinction between environmental regulation and local land use planning. *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 107 S. Ct. 1419, 1428 (1987) (land use chooses particular uses for land; environmental regulation requires that damage to the environment is kept within given limits). Congress, fully cognizant of this distinction, has in the statutes the Tribe cites extended to Indian tribes certain environmental regulatory authority over all reservation land, but has not provided for a tribe's authority over land use.[2] In implicit recognition of this approach, the Department of the Interior, Bureau of Indian Affairs ("BIA") has provided for displacement of State land use authority only over *trust* land:

> § 1.4. State and local regulation of the use of Indian property.
>
> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community *that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.*

25 C.F.R. § 1.4(a) (1988) (emphasis added). *See also Santa Rosa Band v. Kings County*, 532 F.2d 655, 664-666 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). To assert, as certain *amici* of the Tribe do, that zoning authority is merely a surrogate for environmental regu-

[2] The record shows as well that timber operations on fee land in the closed area is subject to State forestry practices regulation. Br. Tr. 606; *WB* at 9-10.

lation, *see, e.g., Colville Brief* at 28, is to ignore this plain distinction.

In fact, as the appendix to petitioner Brendale's opening brief shows, after the local office of the BIA sanctioned the Tribe's closure of the roads into the "closed area" of the reservation, the Assistant Secretary of Indian Affairs reversed that decision. He did so because the BIA is not authorized under federal law to implement such tribal land use controls. *Brendale Brief* at 1a-5a. The Tribe and every one of its *amici* fail even to cite this ruling, preferring to rely solely on the Tribe's unilateral decision to close part of the reservation. *See RB* at 4. Their silence cannot erase this ruling's impact. No longer can the Tribe claim express federal endorsement of the line it drew arbitrarily across roads that under federal law are accessible to all citizens. Thus, not only are the general statutes the Tribe cites unsupportive, but the Executive Branch has expressly refused to endorse the power the Tribe claims.

3. *Montana Is Well Reasoned. Montana* is not an anomalous decision.

Montana's requirement that there be an express Congressional delegation of authority for a tribe to exercise "power beyond what is necessary to protect tribal self-government", 450 U.S. at 564, does not contradict what the Tribe characterizes as the *Colville/Wheeler* formulation that tribes retain those powers that Congress has not explicitly or implicitly divested. *See RB* at 40. *Montana* speaks of the need for delegation in the context of its explanation that Congress can divest a tribe of a given power, and once it has, the Tribe cannot reacquire it absent Congress's intervention. *Montana* cites for this proposition that portion of *Williams v. Lee* that includes the statement "*absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358

U.S. 217, 220 (1959) (emphasis added). *Cf. Montana*, 450 U.S. at 564, *citing*, *Williams v. Lee* at 219-220. *See also Washington v. Confederated Tribes Of The Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (a tribe is divested of power when its exercise "would be inconsistent with the overriding interests of the National Government").

Montana's discussion of the need for express Congressional delegation should therefore not be understood as establishing a false dichotomy between a view of tribes as original sovereigns vs. tribes as *solely* possessors of delegated authority. In the contested language, *Montana* was not addressing a tribe's power pre-divestment; the phrase in question merely states how a tribe divested of a certain power may come to possess it anew.

Montana is also not out of step with such recent cases as *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). *LaPlante* recognizes that tribal "[c]ivil jurisdiction over [the "activities of non-Indians on reservation lands"] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 17. *Montana*'s assertion that the Allotment Acts are such a specific federal statute, 450 U.S. at 559 n.9, does not contradict *LaPlante*. It is merely an example of an instance the *LaPlante* language envisions.

III. CHECKERBOARD LAND USE REGULATORY AUTHORITY WITHIN THE RESERVATION IS NOT A PER SE THREAT TO THE TRIBE'S POLITICAL INTEGRITY, ECONOMIC SECURITY OR HEALTH AND WELFARE.

The Tribe and its *amici* assert that because the Tribe admittedly possesses zoning jurisdiction over all reservation trust land, the County's exercise of zoning authority over nonmember fee land within the reservation necessarily interferes with the Tribe's authority and as a matter of law so threatens its political integrity as to bring

the case within the *Montana* exception designed to preserve tribal self-government. *RB* at 17. There are several fatal difficulties with this assertion.

First, it finds support *not* in the facts of record, but in the Tribe's—and the Ninth Circuit's—political view that comprehensive zoning power is "fundamental to a local government" and therefore *must* be an attribute of the Tribe's authority. *RB* at 32. In contrast, the District Court found as fact that

> [T]here is *no evidence whatsoever* presented in this case to be the basis for a finding that the exercise by Yakima County of its zoning jurisdiction over the deeded land in the Open Area would interfere with the political integrity, economic security, or health or welfare of the Tribe.

W. Pet. at 99a (emphasis added). *See also* Fed. R. Civ. P. 52(a).

It is inappropriate to rely on platonic notions of what, by some lights, tribal authority ideally entails, when this Court has clarified repeatedly that tribal authority is not subject to blanket definition. "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). To posit Tribal authority in derogation of the facts of record and based on a political presupposition concerning the benefit of comprehensive land use power, is to transform *Montana*'s *exception* for authority *necessary* for a Tribe's maintenance of political integrity into little more than a reification of one view of the police power.[3]

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[3] Moreover, to uphold the Tribe's assertion of a *per se* entitlement to zoning authority over non-Indian owned land would be anomalous—it would be to recognize a power in the Tribe greater than the analogous power the United States possesses under the property and supremacy clauses to regulate non-federal land. *See State of Minnesota By Alexander v. Block*, 660 F.2d 1240, 1249 & n.18 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (Congress

Second, the Tribe's assertion of the need for comprehensive land use regulatory power in the open area flies in the face of the District Court's express finding that the County's zoning is more protective of agriculture, the preservation of which is the admitted object of Tribal open area zoning, than is the Tribe's. *See W. Pet.* at 53a, ¶ 9; *RB* at 7.[4] It is simply inappropriate to ignore the facts of record and attempt to justify comprehensive Tribal land use authority based upon general assertions that other States or Counties allegedly have a "less than normal concern" for regulating reservation land.[5] This is political rhetoric that distorts *this case*, wherein the District Court expressly related its observation of the County's sensitivity to Tribal concerns. *W. Pet.* at 100a. This case is thus distinguishable from *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982), where the "absence of any [state] land use control over lands within the Reservation" might justify the impression of local government's alleged indifference.

It is also inappropriate to ignore the clear record that County authority in this case is circumscribed by State law, and thus that the Tribe is safeguarded from the danger of local prejudice. *See, e.g.*, Tr. 494-495 (the County treats the Tribe as a "consulted agency" under Washington's Environmental Policy Act); *WB* at 13. *Cf. Santa Rosa Band of Indians v. Kings County*, 532 F.2d at 664.

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has no plenary authority over non-federal land, but may regulate conduct on such land *only* if Congress demonstrates that it *must* exercise such power to protect federal property).

[4] Contrary to the Tribe's assertion (*RB* at 8), Wilkinson certainly does not contend that the County acted exclusively in regulating reservation land. Wilkinson discussed the Tribe's regulatory history in his brief. *WB* 14-15. It is the propriety of this regulation, not its existence, that is at issue.

[5] *See, e.g., Standing Rock Sioux Brief* at 9. *See also Fort Berthold Tribes Brief* at 10-12. Eleven States and an untold number of counties and cities are concerned enough to have filed briefs here.

Third, the concern expressed in *Moe v. Confederated Salish and Kootenai Tribes*, that checkerboard jurisdiction is impractical because it would require enforcement personnel " 'to search tract books in order to determine whether criminal jurisdiction' " existed, 425 U.S. at 478, *quoting, Seymour v. Superintendent*, 368 U.S. 351, 358 (1962), should not be read as a broadly controlling assessment of what tribal governmental efficiency legally requires. As a practical matter, *Moe's* observation is inappropriate in this context; recourse to maps is a regular, necessary aspect of the application and enforcement of land use regulations. Moreover, land use regulation does not present the need for immediate, possibly life-and-death response determinations essential in the area of criminal jurisdiction.

Ultimately, any inefficiency attributable to checkerboard zoning jurisdiction is the necessary result of pressing, paramount concerns about the intent of Congress and the Constitutional rights of United States citizens. Moreover, if checkerboarding proves as inefficient as the Tribe asserts, it should be an impetus leading the parties to a cooperative, political resolution of what in truth is essentially a political question of local land use control. *Montana* does not preclude such an approach; it merely recognizes the limits Congress has placed on a tribal power that would otherwise be regularly exercised over disenfranchised citizens.

Fourth, and most telling, the Tribe's assertions about the inefficiency, peril, and general unacceptability of checkerboard zoning authority are absolutely inconsistent with the Tribe's simultaneous insistence that *its* zoning scheme excepts from its reach all the incorporated cities in the open area. *See RB* at 7 n.6, 12 n.9, 14 n.10, 25 n.15 & 31. The Tribe has, in its words, *chosen*—presumably as the only politically expedient option—to create a checkerboard scheme of its own, carrying with it all the potential for conflict that it finds offensive in the County's regulation of the open area. This is not a

mere academic objection. Taking the Tribe at its word, it appears that its choice illustrates the core of Wilkinson's objection: questions of local land use planning theory are essentially political, and thus, absent the compelling factual showing *Montana* requires, it is not for the judiciary to posit in the Tribe a comprehensive zoning power over nonmember fee land. The facts of record as found by the District Court should determine the extent to which there is a need for Tribal authority over nonmember fee land in this case, and any reassessment of those facts must be made under the constraints of Federal Rule of Civil Procedure 52(a). *Cf. Montana*, 450 U.S. at 564 & 566 ns. 13, 15 & 16.

IV. THE TRIBE'S PRECONSTITUTIONAL STATUS DOES NOT INSULATE ITS ACTIONS FROM CONSTITUTIONAL SCRUTINY WHEN THE TRIBE EXERCISES GOVERNMENTAL POWER CONGRESS HAS DELEGATED TO IT.

A. *Talton v. Mayes* Is Not Controlling.

The Tribe aserts that *Talton v. Mayes*, 163 U.S. 376 (1896), precludes Wilkinson from successfully contending that the Tribe's exercise of civil regulatory power over nonmembers is subject to scrutiny under the Fifth Amendment. *See RB* at 47-49. The Tribe's response misperceives the issue presented.

It is uncontroverted that *Talton v. Mayes* establishes only that a tribe's pre-Constitutional status insulates its activities from Constitutional scrutiny when the tribe is exercising its *original* authority. Wilkinson's argument proceeds from this assumption to the next, unanswered question: whether a tribe that is divested of a given power, but regains it by Act of Congress, would thereafter be an arm of the federal government when it exercises that power. *See United States v. Wheeler*, 435 U.S. 313, 328 n.28 (1978).

It is Wilkinson's position that Congress, both in the Allotment Acts and as a necessary, implied condition of

its recognition of the Tribe's dependent status, divested the Tribe of the broad, civil authority the Tribe claims over nonmembers and their fee land. *Montana*, 450 U.S. at 564. The Tribe contests this, but also asserts that Congress has repudiated the assimilationist policies underlying those Acts, and in practical effect has restored to the Tribe whatever the Allotment Acts took away. *RB* at 44.

If this Court proves the Tribe correct in its latter assertion, the question Wilkinson frames becomes necessary to decide.

B. Wilkinson Is Without Electoral Or Effective Judicial Redress For Arbitrary Tribal Exercise Of The Power Congress Has Allegedly Delegated To It.

It is uncontested that Wilkinson, while allegedly subject to the Tribe's governmental power of land use control,[6] is nonetheless disenfranchised from all participation in Tribal government. The only justification for this is a matter of blood: Wilkinson is not a member of the Tribe. It is similarly uncontested that, while the Tribe's zoning ordinance purports to subject Wilkinson to outright expulsion from his home, (Jt. App. 56), he is without access to direct judicial review of Tribal land use decisions mandating that penalty (Jt. App. 54). *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *See also* RB at 28 n.17 (asserting the Tribe's immunity from suit).

These stark deprivations are not in any way ameliorated by the irrelevant assertions of the Tribe's *amici*

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[6] Land use control is undoubtedly a core, traditional governmental activity. *See, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 n.8 (1978). The Tribe's exercise of such a federally delegated power should cause it to assume the status of a governmental actor, triggering the application of the Fifth Amendment. *Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971, 2985 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

that *other* tribal constitutions extend nonmembers certain rights, *Swinomish Brief* at 8; that *other* tribes provide nonmembers representation in tribal land use planning bodies, *see, e.g., Colville Brief* at 13 n.14; by the specious assertion that the "ability to vote" is not an "essential" protection of a landowner such as Wilkinson who *resides* on the land subject to the Tribe's control, *id.* at 13;[7] or by the unhelpful suggestion that Wilkinson could possibly prove an "offsetting" claim if he is sued by the Tribe, or that he might be able to sue a tribal official acting outside the scope of official authority, *see Brief of Colorado River Indian Tribes* at 29.

The hard truth is that Wilkinson is without effective redress. The situation of citizens such as Wilkinson has not escaped the attention of the lower federal courts, some of which have felt compelled to go almost unseemly far in distinguishing this Court's authority to provide redress. *See, e.g., Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981); *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919 (D. Mont. 1988). These cases create an unmistakable tension in the law bred of an awareness of the fundamental and unacceptable incongruity of Congress subjecting citizens of a Nation founded on the principle that the "sovereign governs only with the consent of the governed," *Nevada v. Hall*, 440 U.S. 410, 426 (1979), to the delegated, unchecked authority of an alien power.

The only defense the Tribe offers to these facts is that Congress can once again divest the Tribe of the power

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[7] *Cf. Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live"). *See also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 n.8 (1978) (casting significant doubt on the constitutionality of a municipality's exercise of the "vital and traditional" authority to "zone property for various types of uses" when those subject to that power are disenfranchised).

it now exercises if the Tribe goes too far. *RB* at 48-49. This conveniently ignores the interim harm. *See, e.g., First English Evangelical Luthern Church of Glendale v. County Of Los Angeles*, 482 U.S. ——, 107 S.Ct. 2378 (1987). It also begs the question of whether Congress is constitutionally free to delegate such power subject only to a political check. *Cf. Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985). The Tribe offers as defense nothing less than insulation of Congress from the constraints of the Fifth Amendment. The only prudential response is that of this Court in *Oliphant* and *Montana* pretermitting this question: Congress has divested the Tribe of the broad power it seeks here, and because of the United States's "great solicitude" that its citizen's liberty be protected, that Tribal power remains moribund absent the compelling factual showing *Montana* requires.

V. ANY REMAND FOR A BALANCING OF COUNTY AND TRIBAL INTERESTS IN REGULATING NONMEMBER USE OF OPEN AREA FEE LAND WOULD BE A WASTEFUL ACT IN DISREGARD OF THE DISTRICT COURT'S UNREFUTED FINDINGS OF FACT.

The Tribe asserts that if its attack on *Montana* fails, this Court should affirm the Ninth Circuit's remand of Wilkinson's case (*Whiteside II*) to the District Court for a balancing of the competing interests of County and Tribe to regulatory authority over nonmember fee land in the open area. This position reflects at least three crucial errors.

First, the Tribe (*RB* at 32) incorrectly asserts that the County failed to identify any off-reservation impact of Tribal or County authority in the open area. There is strong testimony in the record detailing the off-reservation importance to Yakima County of the preservation of the agricultural characteristics of open area fee land. *See* Tr. 416-423; Ex. 244; *WB* at 10-11. In light of this evidence, the District Court found specifically that Yakima

County's open area zoning is "expressly designed to protect the County's valuable agricultural land and other resources." *W. Pet.* at 52a, ¶ 7.

Second, the District Court has already assessed the factual impact of checkerboard jurisdiction and found that it was neither difficult nor impossible to administer. *W. Pet.* at 97a.

Third, the Tribe and its *amici* ignore that the District Court has already accomplished all the balancing that can be done. The District Court determined that the Tribe presented "*no evidence whatsover*" that could support the Tribe's assertion that County regulatory authority interfered with its political integrity, economic security, or health or welfare. *W. Pet.* at 99a (emphasis added). This is unequivocal. The Tribe has nothing to bring to the scales; only the most cavalier disregard of Fed. R. Civ. P. 52(a) can alter the District Court's decision.

VI. CONCLUSION.

For the foregoing reasons, and those Wilkinson has previously briefed, this Court should grant the relief Wilkinson requested in his opening brief.

Respectfully submitted on December 2, 1988.

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